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No. [redacted] 178

IN THE

Supreme Court of the United States

October Term [illegible]

CENTRAL UNION TRUST COMPANY
OF NEW YORK,

Appellant,

vs.

ANDERSON COUNTY, TEXAS, THE CITY OF
PALESTINE, GEO. A. WRIGHT, et al.,

Appellees.

Appealed from the District Court of the United States
for the [illegible] District of Texas.

BRIEF FOR APPELLEES

Anderson County, [illegible] City of Palestine, [illegible]
Geo. A. [illegible]
[illegible]

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Appealed from the District Court of the United States for the Southern District of Texas.

BRIEF FOR APPELLEES,

Anderson County, Texas; City of Palestine, Texas; Geo. A. Wright; A. L. Bowers; John R. Hearne; Z. L. Robinson; E. W. Link; R. C. Sewell; John M. Colley and P. H. Hughes.

This suit, while called by the appellant an ancillary suit to a certain foreclosure proceeding against the

International & Great Northern Railway Company pending in the District Court of the United States for the Southern District of Texas, is in reality, as plainly shown by the bill of complaint, an attack upon and an effort to annul judgments of the courts of Texas wherein it was decreed that the general offices, shops and round houses of the railroad, by whomever owned or operated, should, in virtue of and as required by the statute law of Texas, be permanently maintained in the City of Palestine, in Anderson County, Texas.

Those judgments were affirmed, and the rulings of the Texas courts as to the effect and operation of the Texas statutes upheld by this Honorable Court in International & Great Northern Railway Company vs. Anderson County, et al., 246 U. S. 424.

The bill of complaint was dismissed on the motion of these appellees, because, as held by the trial court, the suit was not in any proper sense an ancillary action to the foreclosure proceeding and hence the court was without jurisdiction, since, otherwise, the venue of the suit, as shown by the bill, was in the Eastern, and not the Southern District of Texas where brought.

The bill alleged that all of the defendants other than the International & Great Northern Railway Company, these appellees, were citizens and residents of Palestine, Anderson County, Texas, which was alleged to be in the Eastern District of Texas. It showed that under the judgments of the Texas courts, affirmed by this Court, in International & Great Northern Railway Company vs. Anderson County, et al., 246 U. S. 424, and thereby made final, and which it was the purpose of the suit to destroy, the City of Palestine, in Anderson County and the Eastern District of Texas, was lawfully the place of the location of the general offices of the International & Great Northern Railway Company, a Texas corporation, the sole other defendant. Hence the bill showed that as established by final judgment, where that question was in issue, the International & Great Northern Railway Company was also a resident of the Eastern District of Texas. G. H. & S. A. Ry. Co. vs. Gonzales, 151 U. S. 497.

By Article 6437 of the Revised Civil Statutes of Texas it is provided that "the public office of a railroad corporation shall be considered the domicile of the corporation."

Since the judgment in the suit of Anderson County,

et al, established that, lawfully, the domicile of the defendant Railway Company is at Palestine, in the Eastern District of Texas, that judgment, pleaded as it is in the bill, in its establishment of the lawful domicile of the Railway Company governs so long as the judgment stands. The bill shows that it still stands.

As shown by the bill, therefore, all of the defendants are residents of the Eastern District of Texas.

The opinion of the District Judge sustaining the motion to dismiss the bill is given in the Transcript, pages 61-5. The first part of it deals with a contention not urged here by the appellant.

For an understanding of this suit, its nature and its purpose, a brief reference to the history of the prior litigation out of which it grows, and which culminated in the decision of this Court in International & Great Northern Railway Company vs. Anderson County, et al., 246 U. S. 424, as found in Mr. Justice Holmes' opinion and the opinions of the Supreme Court of Texas, and the Court of Civil Appeals there referred to, and dealt with in the bill of complaint, is necessary.

In 1889 the Legislature of Texas enacted what has

been commonly known as "The Railroad General Offices Act." The Act was founded in public experience and grew out of public necessity. It is now expressed in Articles 6423, 6424, and 6425 of the Revised Civil Statutes of Texas, copied as an exhibit in appellant's brief.

Article 6423 provides that every railroad chartered by this State shall keep its general offices, machine shops and round houses at such places as it may have contracted to keep them for a valuable consideration received; **"and if said general offices and shops and round houses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made, then said location shall not be changed; and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization."**

Article 6425, Section 3 of the original Act, denounces penalties for the violation of Article 6423, those penalties being the forfeiture of the charter of the railroad company, and in addition a fine of $5,000.00 for every day of the violation.

In furtherance of the public policy expressed in

the Act of 1889, in 1915 the Legislature amended former Article 6435 so as to prohibit any railroad corporation, **after the taking effect of the amendment —which was ninety days after March 20th, 1915— from changing, thereafter, the location of its general offices, machine shops and round houses, save with the consent and approval of the Railroad Commission of Texas**; the amendment applying, as well, to **receivers** and to **purchasers** of the franchises of properties of railroad companies and to **new corporations** formed by such purchasers or their assigns. By the amendment the Railroad Commission was forbidden to consent to or approve any removal or change in location in conflict with the restrictions of Article 6423.

This amendment of Article 6435 may be found in Volume 2 of the 1918 Supplement of Vernon's Texas Civil and Criminal Statutes, at page 1438. It is set out in the Appendix, page 46.

The original International and Great Northern Railroad Company was formed by the consolidation under the Act of the Legislature of Texas of April 24th, 1874, of two then existing railroad companies, each of which had been previously chartered by the Legislature, namely, the Houston and Great Northern Rail-

road Company and the International Railroad Company.

In 1872 the line of the Houston and Great Northern Railroad Company extended from Houston to the north boundary line of Houston County. The line of the International Railroad Company extended from Palestine to Hearne.

In the year 1872, Galusha A. Grow was the President of the Houston and Great Northern Railroad Company, and in that year he sought out the Honorable John H. Reagan, at Palestine, and through him proposed to the citizens of Palestine and Anderson County to extend the line of his railroad so as to intersect at Palestine the line of the International Railroad Company, and to establish and forever maintain at Palestine the general offices, machine shops and round houses of the Railroad, in consideration of the due issuance and delivery to the Railroad Company of bonds of Anderson County in the amount of $200,000.00. The amount of the bonds was finally determined on as $150,000.00. A binding contract was made between Grow and Judge Reagan for the extension as stated of the line of the Houston and Great Northern Railroad Company, and for the location and mainte-

nance forever at Palestine of the general offices, machine shops and round houses of the Railroad, in consideration of the $150,000.00 of bonds of Anderson County. Judge Reagan canvassed the County to induce the voting of the bonds. They were duly voted and issued and were delivered to Grow for his Railroad Company.

In part performance of the contract, the Houston and Great Northern Railroad Company promptly located its machine shops and round houses at Palestine, and there maintained them until the consolidation of that Company and the International Railroad Company, and since that consolidation they have been maintained at Palestine.

In 1875 the International and Great Northern Railroad Company, acting through H. M. Hoxie, its General Superintendent, further agreed to perform the previous contract of the Houston and Great Northern Railroad Company by promptly bringing the general offices of the International and Great Northern Railroad Company to Palestine, and to forever maintain at Palestine the general offices, machine shops and round houses of the International and Great Northern Railroad, in consideration, in addition to past benefits, of the construction by the people of Palestine at their

own expense under the Railroad Company's direction of all houses required for occupancy by the general officers and employees of the Company; which agreement so made by Hoxie with the people of Palestine was fully performed by them by their construction of the required houses.

The contracts made by Grow and by Hoxie were afterwards fully ratified by the directors of the respective Railroad Companies.

Following the agreement by Hoxie, the general offices of the railroad were located at Palestine and were maintained there. They were removed for a time, but were returned; and from 1888 to 1911 remained there continuously.

In 1911, the properties of the International and Great Northern Railroad Company were sold at a receiver's sale. Following the sale, the International and Great Northern **Railway** Company was chartered for the operation of the railroad. It took over the properties and proceeded with such operation.

In taking out its charter, the International and Great Northern **Railway** Company named **Houston,** Texas, as the seat of its general offices. It then became immediately apparent that the purpose was to

move these general offices from Palestine to Houston. About September 1st, 1911, the Railway Company undertook to establish the general offices of the Company at Houston, moving certain general offices to New Orleans, leaving only two general officials at Palestine. It announced its purpose to change these as well, and also to change the location from Palestine of the machine shops and round houses of the railroad. As stated, it had already moved away from Palestine, following the taking out of its charter, all of its general offices except as to two officials.

This action and threatened action on the part of the Railway Company gave Anderson County and the City of Palestine no other alternative but resort to the courts.

They thereupon instituted their suit in the State District Court of Anderson County, and obtained a preliminary injunction against the Railway Company, restraining the removal of the round houses and shops and such of the general offices as remained at Palestine and requiring the return to Palestine of those of the general offices which had been moved away.

From the granting of this injunction the Railway Company appealed. Various contentions were made by the Railway Company. It strenuously denied that

the contract referred to was ever made between Grow and Judge Reagan, or the later contract between Hoxie and the citizens of Palestine. If they were made, it contended they were merely the personal obligations of the International and Great Northern Railroad Company, which were discharged by the receivership sale of the properties of that Company.

It was sought to entirely defeat the plain effect of Article 6423—of the Act of 1889.

The appeal reached the Supreme Court of Texas. The Supreme Court of Texas held that the case as made by the petition, founded as it was on the contracts with Grow and Hoxie, above recited, and the consideration paid under those contracts to the Railroad Companies by Anderson County and the citizens of Palestine, namely, the delivery of $150,000.00 in bonds of Anderson County and the construction of the houses, above referred to, was such as to clearly subject the International and Great Northern Railroad Company to the obligation and duty imposed by the Act of 1889 to maintain its general offices, machine shops and round houses at Palestine.

It furthermore held that this duty was essentially a public one; that it rested not only upon the Inter-

national and Great Northern Railroad Company but upon the International and Great Northern Railway Company which had succeeded to the ownership of the railroad, since in its very nature it was a continuing duty which accompanied the right to operate the railroad, inhering in the franchise and subsisting with the franchise in the hands of the International and Great Northern Railway Company as the owner of the franchise.

All contention of the Railway Company as to the obligation being discharged in virtue of the sale under foreclosure of the properties of the International and Great Northern Railroad Company, was squarely overruled.

> International and Great Northern Railway Company vs. Anderson County, et al., 106 Texas 60.

Under this determination of the law, the case, on change of venue, was tried on its merits in the District Court of Cherokee County.

On that trial every issue of fact was resolved against the Railway Company. Every defense presented by it was determined against it.

The jury found that the contract between Judge Reagan for the establishment and maintenance forever at Palestine of the general offices, round houses and shops of the railroad, in consideration of the issuance and delivery of the bonds of Anderson County in the amount of $150,000.00, was made, as Judge Reagan had affirmed it was made; that the bonds of the County in the amount stated were voted and issued and were delivered to the Houston and Great Northern Railroad Company.

It found that the contract and action of Grow were afterwards ratified by the Houston and Great Northern Railroad Company.

It found that the contract between Hoxie, acting for the International and Great Northern Railroad Company, and the citizens of Palestine whereby that Company agreed to perform the contract made by Grow for the Houston and Great Northern Railroad Company, was made, and that the citizens of Palestine fully performed their part of the contract.

It found that afterwards the International and Great Northern Railroad Company fully ratified the contract made by Hoxie.

Among other defenses presented by the Railway

Company was that of a burden being imposed on interstate commerce by the maintenance of the offices and shops at Palestine. The jury found that their maintenance at Palestine would impose no such burden.

The result was a judgment decreeing that the Railway Company should forever keep and maintain the general offices, machine shops and round houses for the operation of the railroad, in the city of Palestine, where the Houston and Great Northern Railroad Company and the International and Great Northern Railroad Company each had, for a valuable consideration received, contracted and agreed to forever keep them; and enjoining the Railway Company from maintaining elsewhere than at Palestine the general offices of certain named general officials (those named in the Texas Statutes) for the operation of the railroad, and from changing the location of the machine shops and round houses from Palestine.

On the Railway Company's appeal, the judgment was affirmed by the Court of Civil Appeals for the Sixth District of Texas.

International and Great Northern Railway Company vs. Anderson County, et al., 174 S. W. 305.

A writ of error was denied by the Supreme Court of Texas.

The Railway Company then carried the case on writ of error to this Court.

This Court affirmed the judgments of the District Court and the Court of Civil Appeals. 246 U. S. 424.

It held that the foreclosure sale of the properties of the International and Great Northern Railroad Company did not exempt the International and Great Northern Railway Company as the owner of the railroad from the duty resting upon the former company under the public law of the State. It agreed with the holding of the Supreme Court of Texas that the obligation imposed by the public law of the State upon the prior company was likewise imposed upon the succeeding company. It ruled against the Railway Company's contention in respect to any burden being imposed on interstate commerce.

The decision was a square rejection of every contention put forth by the Railway Company whereby it sought to escape the obligation imposed by the law of the State to maintain these offices and shops at Palestine.

Six years were required for the settlement of the controversy. The suit of Anderson County, et al., in the State court was instituted February 6th, 1912. The case was finally decided by this Court April 15th, 1918.

The defendants in the present bill of complaint except the Railway Company were the plaintiffs in the suit of Anderson County, et al. Appellant's Brief, pages 3 and 22.

The opinion of the Court, 246 U. S. 424, following the statement of the case (bold print ours) is as follows:

> "The railway company denies the jurisdiction of the state court and sets up that the court of the last foreclosure is the only proper forum. But a decree of foreclosure does not render the purchaser and property foreclosed sacrosanct. The Circuit Court had finished the case and had given up possession and control before this suit was brought. Shields vs. Coleman, 157 U. S. 168, 178, 179. Wabash R. R. Co. vs. Adelbert College, 208 U. S. 38, 55. Even if it were true that the foreclosure sale and order carried an immunity from the present demand that the railway was entitled to set up, in the absence of action on the part of the Court of the United States, it would not take away the power of the state court to de-

cide as to the existence of an alleged public duty on the part of a railroad within the territory where the court sat. Ricaud vs. American Metal Co., ante, 304.

"But the foreclosures did not have the supposed effect. **They no more removed all human restrictions than they excluded the authority of ordinary courts.** Suppose that a special act incorporating the mortgagor had provided in terms evidently intended to reach beyond foreclosure that the general offices were to remain forever at Palestine, it hardly would be argued, and certainly would not be argued here or in Texas with success, that the requirement could be touched by a decree. But if **the law** made that requirement, it hardly matters whether the restriction was imposed by charter or otherwise or whether the remote reason for it was a contract or a general notion of public policy. **The state courts hold that when the law on any ground fixes the place of the offices and shops the obligation is indelible by foreclosure. We see no reason why their decision should not prevail.**

"It is contended that the Office-Shops Act of 1889 does not touch the plaintiff in error by its terms and that if it be construed to do so it is unconstitutional. On the construction of the act it seems to us that there can be no doubt. It is

true that the provision requiring the general offices to be maintained at the place where the railroad had contracted to keep them is conditioned on no place being named in the charter, but of course this does not mean that articles framed under a general law can get rid of contracts that otherwise would bind, and in our opinion it is equally plain that no distinction was intended between the contract by the present road and one by its predecessor, if the office and shops 'are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made.' 'Then,' the statute says, 'said location shall not be changed.' The construction of the act by the state court is beyond criticism upon this point.

"It is said that the act so construed would infringe the constitutional rights of the parties to the mortgage of 1881, which the plaintiff in error took by foreclosure. But it will be remembered that the mortgagor under the law then in force merely had succeeded to the original contractors, freed from their unsecured debts, no doubt, but, it well might be held, not freed from the obligation in question. Also it was found by the courts below that the sale under which the mortgagor took in 1879 was not a bona fide sale, and so was not a sale that put the purchaser in a position other than that of mort-

gagor. **Apart from these considerations we should be slow to say that it was not within the power of a state legislature dealing with a corporation of the State to fix the place of its domicile and principal offices, in the absence of other facts than those appearing in this case. But furthermore when the Office-Shops Act was on the statute book the plaintiff in error took out a charter under general laws that expressly subjected it to the limitations imposed by law. It is said that this does not make the plaintiff in error adopt an otherwise unconstitutional statute. But even if, contrary to what we have intimated, the Act could not otherwise have affected those particular corporations, it was a law upon the statute books and was far from a mere nullity, and if it was made a condition of incorporation that this restriction should be accepted, the plaintiff in error cannot complain. Interstate Consolidated Street Ry. Co. vs. Massachusetts, 207 U. S. 79. We agree with the State courts that the condition was imposed.**

"The acceptance of the charter by the plaintiff in error disposed of every constitutional objection but one. It is said that the restriction imposes a burden upon commerce among the States, since the road concerned has expanded and now is largely engaged in such commerce. The jury

found that it imposed no such burden, upon an issue submitted to them in accordance with the desire of the plaintiff in error, although not in the form that it desired. So far as the question depended upon the testimony adduced the verdict must be accepted, and although no doubt there might be cases in which this Court would pronounce for itself, irrespective of testimony, whether a burden was imposed, we are not prepared to say that in this instance the State has transcended its powers. **The burden, if any, is indirect.** Some complaint is made of the form of the judgment, as purporting to be perpetual. But the word perpetual adds nothing to a requirement that the office and shops should be maintained in Palestine. **The requirement is perpetual until the law is changed.** When and how it may be changed is not before us now. Other objections are urged and other details are adverted to in the very lengthy printed arguments, besides those with which we have dealt, but we deem it unnecessary to go farther. Upon the whole case we are of opinion that the judgment below should be affirmed."

The plain purpose of the present suit, filed June 5th, 1922, as the next step in the effort to move these general offices, shops and round houses from Palestine, as has been said, is to destroy the effect of the

judgment heretofore obtained by Anderson County, et al., against the International and Great Northern Railway Company, and now subsisting in full force, requiring the maintenance at Palestine of the general offices, round houses and shops of the railroad. The prayer is that the defendants be enjoined **"from asserting their claims and maintaining that the general offices of the International and Great Northern Railway, or of any purchaser under the decree of foreclosure obtained by the plaintiff in this Court, or any further decree of this Court, operating the International and Great Northern Railway or its properties, and the shops and round houses thereof, or either of them, shall be at Palestine in Anderson County, Texas, and be forever maintained there; and that the decree forever restrain and enjoin the defendants and their successors and those they may represent from making such claims or assuming in any court to enforce the same; * * * and that it be decreed that the defendants' claims are null and forever held for naught; and that the International and Great Northern Railway and the properties which have been foreclosed on, be freed from the burden and cloud of the defendants' claims"** (Tr. pp. 29-30).

The defendants' "claims" so referred to, are shown

by the bill to proceed from and rest upon, solely, the judgment rendered in favor of Anderson County, et al., in the District Court of Cherokee County, Texas, which the bill itself pleads became final in 1918. It became final by the judgment of this Court.

The bill at great length attempts to set out why these "claims" of the defendants are unfounded. In other words it attempts to point out why the judgment rendered in favor of Anderson County, et al., was, as it says, improperly rendered. It sets up every defense which was set up by the Railway Company in that suit. Its obvious attempt is to have relitigated in this suit every question which was litigated in that suit.

The plainly disclosed purpose of the present suit is, therefore, to destroy the effect of that judgment and to relieve the International and Great Northern Railway Company from its operation.

If the International and Great Northern Railway Company can by this means be relieved from the operation of that judgment, the present International-Great Northern Railroad Company will be relieved from its operation.

The present defendants, except the Railway Com-

pany, are as the bill shows and as already said, the plaintiffs in that judgment. The bill discloses that what it calls their "claims" proceed entirely from that judgment. The bill prays that they be enjoined from "assuming in any court to enforce the same." This can only mean that they are sought to be enjoined from enforcing their judgment.

The unmistakable purpose of the suit is to undo that judgment, destroy it and to prevent its enforcement.

This is nakedly the character and purpose of the present suit. It matters not what name may be given to it. If the relief for which it prays is granted, that judgment will be destroyed and in defiance of that judgment the present Railroad Company, the International-Great Northern Railroad Company, will be free to move the general offices, shops and round houses of the railroad from Palestine.

As long as the defendants are left unrestrained in the enforcement of that judgment, the offices, shops and round houses can not be so moved.

It is a subsisting judgment therefore of a State court which the present suit touches, and which, by

restraining its enforcement, it attempts to undo and destroy.

Appellant took its mortgage in the year 1911. Appellant's Brief, 24. This was shortly after the chartering of the International & Great Northern Railway Company, formerly the International & Great Northern **Railroad** Company.

Appellant has never been other than a naked mortgagee out of possession.

The Act of 1889, expressed in Articles 6423-5 of the Texas Statutes set out in appellant's brief, was then in force, as it is now. Appellant acquired its mortgage subject to that law. As a valid public law, it imposed upon the Railway Company and every other Company succeeding to the property, a public duty as to the place of maintenance of the general offices, shops and round houses of the railroad. Such was the holding of this Court. As this Court said in its opinion, the requirement that they be maintained at Palestine "is perpetual until the law is changed." No mortgaging of the property could affect this duty imposed by law. Hence, a mortgagee can assert no rights with respect to it.

It was not pretended in the bill that the judg-

ment in favor of Anderson County, et al., which is but declaratory of the public law of the State, had in any degree impaired or would impair the security under appellant's mortgage.

Since the filing of the present bill all of the property and assets of the railroad have been sold and delivered under the foreclosure proceeding. Following the foreclosure sale they were turned over to the International-Great Northern Railroad, a slightly changed name from that of the former Company; and with them it is in full operation as a public carrier. Appellant's Brief, pages 21-2; (Tr. p. 60).

It thus appears that the judgment in favor of Anderson County, et al., to annul which is the purpose of the present suit as one alleged to be ancillary to the foreclosure proceeding, has in nowise interrupted or interfered with the full and effective exercise of the court's jurisdiction in that proceeding.

The statement in appellant's brief, page 23, that at the time of the institution of the suit of Anderson County, et al., which was in the year 1912, as stated on page 22, the properties of the International & Great Northern Railway Company were in the possession of the Federal District Court for the Southern District of Texas through its receivers, is erroneous.

The foreclosure bill was not filed in that court until August 10th, 1914. Appellant's Brief, pages 2 and 23. The further statement appearing at pages 23-4, that during the receivership in the foreclosure proceeding no effort was made to enforce the judgment in favor of Anderson County, et al., is likewise inaccurate. On the filing in 1912 of the suit of Anderson County, et al., as shown in the opinions referred to and in this bill, an injunction was issued requiring that these offices, shops and round houses be maintained at Palestine. That injunction, afterwards made permanent by final judgment, has been in force constantly since and is now; and unremitting effort has been made by Anderson County, et al., to have it observed by those in charge of this railroad.

In answer to the contentions of the appellant, we submit the following propositions.

I.

The suit having been brought by appellant solely in virtue of its mortgage; and it appearing from its amendment to its bill that the mortgage had been duly foreclosed, the sale of all the railroad property thereunder duly made and confirmed, and the property duly delivered to the purchasers and now be-

ing owned by the International-Great Northern Railroad Company with which it is operating the railroad, appellant has no further possible interest in the maintenance of the suit and the appeal is accordingly entitled to be dismissed.

II.

The bill discloses that the suit is not one ancillary to the foreclosure proceeding. And since the bill further disclosed that all the defendants were residents and inhabitants of the Eastern District of Texas, the court was without jurisdiction and the bill was properly dismissed.

ARGUMENT.

We quote merely one paragraph of the amendment to the bill as showing that due foreclosure has been had of the appellant's mortgage; that pursuant to the foreclosure a sale of all the railroad property has been made and duly confirmed; that the property was duly delivered to the purchasers under the foreclosure sale; and that since November 30th, 1922, it has been owned by the International-Great Northern Railroad Company, with which, since that time, that Company has been and is now operating

the railroad—all showing that the appellant's interest in the suit, if it had any interest in the maintenance of such a suit, is at an end.

In the amendment to the bill this is said:

"The Solicitors for the Complainant, after the filing of this bill, made one demand on Lock McDaniel, appointed in the decree Special Master to sell the property and all conditions, advertisements and requirements being complied with, he sold the same at Houston, Texas, at public outcry, to Earle Bailie and Maurice T. Moore for $5,000,000.00 the foreclosed mortgage debt then amounting to over $17,000,000.00 the sale being subject to a First Mortgage and the various obligations of the property and Receivership, as in the decree set out; and Messrs. Bailie and Moore assigned their bid to the International-Great Northern Railroad Company (hereinafter designated as the 'I.-G. N. R. R.') and on August 10th, 1922, this Court affirmed the sale and directed the deed to be made to the I.-G. N. R. R. and the property turned over to it, as in the Order of Confirmation set out; and thereafter, on or about November 25th, 1922, the deed in the form prescribed having been executed, was delivered, and at the end of Novemebr 30th, 1922, the whole railroad and all the assets and properties of the sold out

railway and of the Receiver, or held by them, were turned over to the I.-G. N. R. R. and it then went into action as a public carrier.

"In the decree of confirmation of the sale it was ordered," etc. (Tr. p. 48).

In Texas, a mortgage or deed of trust is not a conveyance. It confers no estate in the property mortgaged. It merely creates a lien upon the property. It is but incident to and security for the debt. The title to the property remains with the mortgagor and with it the right of possession. The payment of the debt extinguishes the mortgage without even a release from the mortgagee. And, of course, a foreclosure of the mortgage equally extinguishes it.

The Supreme Court of Texas, in Willis vs. Moore, 59 Texas, at page 635, said:

> "In this state it has been held, from an early day, that a mortgage is but a security for a debt; that the title to property mortgaged remains in the mortgagor, and with it the right of possession, which is one of the ordinary incidents of title."

In Soell vs. Hadden, 85 Texas, at pages 188-9, it said:

> "The doctrine that the legal title vests in the mortgagee after breach of its condition does not obtain in this State; not even as to personal property. A mortgage both as to real and personal estate is treated as a mere security for the debt."

In Perkins vs. Stearne, 23 Texas, at page 563, this is held:

> "The mortgage is treated in equity as so completely incidental to the debt which it is intended to secure that it is held that the payment of the debt extinguishes the mortgage, and that without any release from the mortgagee. Duty vs. Graham, 12 Texas, 427."

With this the law and the fact being that the appellant's mortgage has been fully foreclosed, it is difficult to perceive how it has any possible further interest in this suit, even if it be assumed that prior to the foreclosure it was possessed of such rights as entitle it to maintain the suit.

Appellant's interest in the railroad is at an end. With its interest ended, any possible right to relief in this suit ceases. Hutton vs. Metropolitan Elevated Railway Company, 46 New York Supp. 169.

For a suit to be ancillary it must in some true sense be in aid of the original cause—necessary to the effective exercise of the court's jurisdiction in that cause. It is but incident to that jurisdiction. Necessarily its subject matter must be such that the court may rightfully deal with it in virtue of its original jurisdiction. If it has to do with matters wholly foreign to the main cause, with which that cause is not and cannot be concerned, involving no character of claim to property affected by the court's decrees, and which offer no obstruction or interference with the full exercise of the court's powers in that cause, it is itself an original, not an ancillary, suit.

If it has to do, as is true of this bill, with a judgment—seeking to enjoin its enforcement—a judgment, too, which does not touch or run against any property and is only declaratory of a public duty of the defendant under the law of the State, a duty which the court itself must recognize in its administration of the defendant's property through its receiver, it cannot be other than an original suit.

Illustration of ancillary jurisdiction is given in the opinion in Hoffman vs. McClelland, ... U. S. 68 L. Ed. 474, as follows:

"It is settled that where, in the progress of a

suit in a Federal Court, property has been drawn into the court's custody and control, third persons claiming interests in or liens upon the property may be permitted to come into that court for the purpose of setting up, protecting, and enforcing their claims—although the court could not consider or adjudicate their claims if it had not impounded the property. Power to deal with such claims is incident to the jurisdiction acquired in the suit wherein the impounding occurs, and may be invoked by a petition to intervene pro interesse suo, or by a dependent bill. But, in either case, the proceeding is purely ancillary."

In Street's Federal Practice, Volume 2, Section 1251, this is found upon the subject:

"In truth, it appears that ancillary suits fall, in the main, into two different classes of cases. (1) The first is that in which the ancillary proceeding is plainly a mere dependency or continuation of the main suit, as in bills to enjoin suits at law, cross bills, supplemental bills, bills to execute decrees, and bills of review. In this class of cases the ancillary proceeding is brought by one who is a party to the principal suit or by some one in privity with such a party. The jurisdiction in this class of ancillary proceedings rests upon the principle that the court, having once

acquired jurisdiction of the parties and subject-matter, necessarily has the power to determine all related and subordinate matters connected with that controversy. (2) The second class of cases is that which has to do with situations where a stranger to the suit wishes to come into the suit in order to assert a lien, claim, right or title to the property or fund that is the subject of the suit. Jurisdiction here flows from the fact that the court has that property or fund in its exclusive control. If a situation is not such as to bring the case within one or the other of these classes, the proceeding cannot be sustained as an ancillary proceeding, but the party must resort to an original bill."

And in Section 1252, this:

"A suit cannot be maintained as an ancillary proceeding, if it calls for the investigation of a new case, arising upon new facts, and new parties are made. Here the remedy must be by simple original bill; and the jurisdiction of the cause must exist independent of the jurisdiction in the former or principal cause."

In Rose's Code of Federal Procedure, Volume 1, Section 19, this is said:

> "Moreover, a Federal Court's power to take cognizance of a proceeding attacking a State judgment or decree, is necessarily limited to such **as may fairly be deemed independent and original**, involving a new case and depending upon new facts, as distinguished from proceedings ancillary and incidental, such as motion for new trial or bill of review based upon irregularities or newly discovered evidence."

Barrow vs. Hunton, 99 U. S. 80, is in our opinion conclusive.

There, a suit was brought in the State court by Goodrich, praying for a decree of nullity against a judgment recovered in the same court by Hunton against Goodrich and another. Hunton removed the case to the United States Circuit Court upon the ground or diversity of citizenship. A motion to remand was denied. After various proceedings Goodrich, the plaintiff, amended his petition so as to conform with the equity practice of the United States Court, converting the petition into a bill in equity in the United States Court and praying the same relief as before.

The ground of the relief sought was that the judgment was void because there was no lawful serv-

ice of the petition and citation in the case out of which the judgment grew.

The question before the court was whether the proceeding thus made in the Federal Court was one merely supplemental or ancillary to the original suit in the State court. It was held to be such a suit and for that reason the jurisdiction of the Federal Court was denied. This was clearly proper, since the purpose of the suit was merely to revise the judgment for an irregularity in its rendition. Jurisdiction for that purpose was accordingly in the court which rendered the judgment, that is the State court.

After showing that the proceeding was but an attempt to revise the judgment because of an irregularity, the opinion proceeds (p. 83):

> **"On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and according to the doctrine laid down in Gaines vs. Fuentes (92 U. S. 10), the case might be within the cognizance of the Federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the**

> **legality and correctness of the judgments and decrees of the State courts; and in the other class, the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof."**

Marshall vs. Holmes, 141 U. S. 589, is equally authoritative. In it the rule of Barrow vs. Hunton was applied. There, the suit was to enjoin judgments rendered in the State court because of fraud in obtaining them. It was first filed in the State court. Later, the plaintiff removed it to the Circuit Court of the United States. The question was the jurisdiction of the Circuit Court.

In speaking of the nature of such a suit, after referring to Barrow vs. Hunton, the following is quoted in the opinion from Arrowsmith vs. Gleason, 129 U. S. 86 (page 599):

> "These principles control the present case, which, although involving rights arising under judicial proceedings in another jurisdiction, is an **original, independent suit for equitable relief between the parties,**—such relief being grounded upon a new state of facts," etc. (Bold print ours).

Further, in the opinion this is said (page 599, Bold print ours):

> "These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, **which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction.**"

This bill does not attack the judgment of the State court rendered in favor of Anderson County, et al., as having been fraudulently obtained, but it does seek relief against it upon various other alleged equitable grounds, involving the same issues determined by that judgment.

If, as held by these authorities, a suit challenging a decree of a State court upon the ground of fraud is in its nature essentially an independent, original action, **of which the Federal Courts would not have jurisdiction if of a different character,** plainly this suit, which likewise upon alleged equitable grounds attacks a judgment of a State court, is equally independent and original.

How could it be less original than Marshall vs. Holmes?

Its purpose, its nature, as an attempt to relieve against a judgment of a court of another jurisdiction, to re-try the questions settled by that judgment, and to escape its operation with respect to this railroad in its declaration of a public duty under the State law running with the railroad and resting upon any owner, stamp it indelibly with the character of an original suit.

It cannot be disguised that the suit is altogether leveled at the Anderson County judgment as rendered by the State court. But for that judgment, there would be no suit. What the bill refers to as "the claims" of these appellees all flow from that judgment and rest upon it. This the bill plainly discloses.

The suit is simply one in equity seeking upon what are alleged as sufficient equitable grounds to take away from the plaintiffs in the Anderson County judgment the benefits of it by restraining its enforcement, exactly as was the nature of the suit in Marshall vs. Holmes.

The action in Marshall vs. Holmes was held to be independent and original. So, we submit, it must be held here of this suit.

What has the foreclosure suit to do, or the jurisdiction of the court in the foreclosure suit, with the reopening of the matters concluded by the Anderson County judgment? What possible kinship is there between such a controversy and a suit to foreclose a mortgage lien?

It introduces into the foreclosure proceeding a wholly new and independent controversy, in no sense related to that proceeding and having nothing properly to do with the exercise of the court's jurisdiction in it — a suit "arising upon new facts," between new parties, and presenting issues entirely foreign to the foreclosure action.

It would be difficult to conceive of a case which more involves interests different from and unrelated to those in a foreclosure proceeding than one which attempts the determination of whether there exist equitable grounds for restraining the enforcement of a judgment of a court of a different jurisdiction in favor of a community and citizens not parties to the foreclosure proceeding and which is only declaratory of a statutory, public duty of the defendant in the judgment.

The Anderson County judgment establishes no

rights in the property of the railroad and does not purport to.

Its enforcement has to do only with the operation of the railroad. The statutory public duty which the judgment only declares, has only to do with the operation of the railroad. The State statute merely provides as to where a railroad company subject to the statute shall maintain certain instrumentalities in the operation of its railroad. It simply declares what shall be the duty of the railroad company in that respect. It does not run against the property. It runs only against the owner of the property by defining what its duty shall be. This is equally true of the Anderson County judgment. It impresses no lien upon the property. It asserts no right to the property. It seeks nothing in respect to the property. There is nothing about its enforcement that could impair the lien of the appellant as it once existed, or that could operate to its prejudice. It is not even asserted in the bill of complaint that its operation will prejudice the lien. It has not in the least interfered with the foreclosure and the sale and delivery of the railroad property, an already accomplished fact. As the amendment to the bill pleads, the foreclosure has been had; the property has been sold; and

the property has been delivered to the present railroad company—all without any interference whatever by reason of the judgment.

The judgment simply declares what the law of the State provides shall be the duty of the owner of this railroad in respect to the place of maintenance of these offices, shops and round houses. It declares that unequivocally, just as the State law is unequivocal. But that is all. It has effect as a judicial finding that the then owner of the railroad was subject to that law. Under the decision of this Court, on the appeal of that case, 246 U. S. 424, as under the decision of the Supreme Court of Texas, 106 Texas 60, any owner of the property is subject to that law so long as the law stands unchanged. The judgment makes no adjudication in respect to the property. As stated, it deals, as does the State law, only with the **place** where certain operations of the railroad shall be carried on, and defines the duty of the owner of the railroad in that respect.

The court's control of the property in the foreclosure proceeding could not be disturbed by its operation; it never was disturbed; and it will not be disturbed in the future as respects any jurisdiction it may continue to possess in that proceeding.

That proceeding has nothing whatever to do with determining where these offices, shops and round houses shall be maintained. There has never been any such issue in that proceeding, and the determination of such a question is wholly foreign to it.

By a competent State court judgment declaratory of a valid State law, it has been determined. If that judgment is to be interfered with; if the questions which it concluded are all to be now reopened and retried; if there is to be no end to the controversy and under the guise and at the behest of this mere naked mortgagee, the holder of a foreclosed and defunct mortgage, it is to drag its weary way again through the courts of the land, it must be by an original and independent proceeding.

We submit that the judgment cannot be rightfully disturbed in virtue of the jurisdiction obtaining only for the foreclosure of a lien.

It is the duty of Federal Courts through their receivers to observe valid State laws affecting the operation of railroads in their custody. It is equally the duty of those courts to observe valid judgments declaratory of such laws. In our opinion it is idle to say that the operation of such a judgment could

amount to an invasion of or interference with the jurisdiction of a court having possession of the railroad property in a foreclosure action. The observance of a valid State law governing the operation of the railroad and of a judgment declaratory of that law being consistent with the court's jurisdiction could not invade its jurisdiction. Both the court's jurisdiction in the foreclosure action and the judgment could operate, as they have operated, wholly without any interference. The foreclosure proceeding, therefore, did not and could not draw to it the question of whether the judgment is entitled to be relieved against as is sought in this suit. Buck vs. Colbath, 3 Wallace, 334.

The authorities cited by the appellant have no application. Julian vs. Central Trust Company, 193 U. S. 93, is illustrative of them. In that case, a suit ancillary to the foreclosure proceeding was held maintainable to protect the purchaser under the foreclosure against levies and sales of the property—to protect, in other words, the title to the property as conferred by the court. There is no such situation here.

While not strictly relevant here, we deem it not inappropriate to say that it is of no consequence that this mortgagee was not included as a defendant in the Anderson County suit. If the duty rested upon the railway company to maintain these offices, shops and round houses at Palestine as the judgment in that suit affirms, a mortgaging of the property could not affect the duty. Hence, a mortgagee could not have been either a necessary or proper party to that suit.

Besides, we think it clear that while not strictly a proceeding in rem, that suit was in the nature of an action in rem, and the judgment in it bound everybody. It could hardly be less in the nature of an action in rem than a proceeding for the laying out of a county road, or for the establishment of disputed boundary lines between adjoining towns, judgments in which character of suits are generally held conclusive upon all persons. Black on Judgments, Volume 2, 2nd Edition, Section 812. Mill Creek Township vs. Reed, 29 Pa. 195; Pitman vs. Town of Albany, 34 N. H. 577.

We respectfully pray that the appeal be dismissed; and if it be sustained, that the judgment below be affirmed.

Respectfully submitted,

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APPENDIX

Article 6435, Civil Statutes of Texas.

CHANGE OF LOCATION OF GENERAL OFFICES, ETC., PROHIBITED; APPLICATION TO RECEIVERS AND PURCHASERS.—No railroad corporation shall have the right in the future to change the location of its general offices, machine shops or round houses, save with the consent and approval of the Railroad Commission of Texas, and this shall apply also to receivers and to purchasers of the franchises and properties of railroad companies and to new corporations formed by such purchasers or their assigns, provided, however, that the Railroad Commission of Texas shall not consent to, or approve of, any removal or change of location, in conflict with the restrictions of Article 6423 of the Revised Civil Statutes of Texas of 1911; and, provided further, that no consent or approval of the Railroad Commission of Texas shall be required before the return of general offices, machine shops or round houses to previous locations when ordered or required under judgments in suits now pending in trial or appellate courts.